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No. 80-

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE COMMONWEALTH OF PUERTO RICO AND THE ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO,
PETITIONERS,

v.

THE SS ZOE COLOCOTRONI, MARBONANZA COMPANIA NAVIERA, S.A., COLOCOTRONI LTD., COLOCOTRONI BROTHERS, S.A., THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG) AND THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LONDON) LIMITED,
RESPONDENTS.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

QUESTION PRESENTED

Whether the Court of Appeals erred in vacating the District Court's judgment which awarded to the Environmental Quality Board and the Commonwealth of Puerto Rico the undisputed replacement cost of the marine animals destroyed by the ZOE COLOCOTRONI oil spill, when the Admiralty and Maritime Law of the United States and the pertinent statute of the Commonwealth of Puerto Rico provide for the recovery of the total value of the damages caused to said resources.

THE PARTIES

Plaintiffs, petitioners herein, are the Commonwealth of Puerto Rico and the Environmental Quality Board (hereinafter "E.Q.B.") of the Commonwealth of Puerto Rico.

Defendants, respondents herein, are the SS ZOE COLOCOTRONI, an oil tanker of Greek ownership and Panamanian registry, her owners, Marbonanza Compania Naviera, S.A., their agents, Colocotroni Ltd. and Colocotroni Brothers, S.A., the ship's protection and indemnity insurer, The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg) (hereinafter "West of England-Luxembourg") and West of England-Luxembourg's managing agents, The West of England Ship Owners Mutual Insurance Association (London) Limited (hereinafter "West of England-London"). "West of England", as used herein in the singular, refers to both the West of Englands, defendants.

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OPINIONS BELOW

The prior opinions most pertinent to this Petition are the August 12, 1980 Opinion of the United States Court of Appeals, 628 F.2d 652 (1st Cir. 1980) (1a)[1], the August 16,

[1] Page references are to the Appendix prepared by petitioners in No. 80-758 which is bound separately from said petition and are cited as " a". The Order of the District Court filed August 10 is not contained in said appendix and therefore is attached to the instant petition as Appendix A (pp. 22 to 27)), and is cited by reference to the page number.

1978 Opinion of the District Court, 456 F.Supp. 1327 (D.P.R. 1978) (57a), the unreported Opinion and Order of the District Court filed January 14, 1977 (109a),The Order of the District Court filed August 10, 1979, The July 10, 1979 Opinion of the Court of Appeals, 601 F.2d 39 (1st Cir. 1979) (49a), the June 11, 1979 Memorandum and Order of the Court of Appeals (55a), the Opinions and Orders of the District Court of October 21, 1977 (103a), November 7, 1975 (119a), September 17, 1975 (121a), April 11, 1974 (122a), April 8, 1974 (124a), January 31, 1974 (137a), July 3, 1973 (152a) and June 19, 1973 (155a), and the United States Magistrate's Report and Recommendation of March 21, 1974 (126a).

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on August 12, 1980 (159a). This cross-petition for writ of certiorari is filed pursuant to Rule 19.5 of the Rules of this Court. Defendants' petition for writ of certiorari was received by plaintiffs, cross-petitioners herein on November 14, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the following constitutional and statutory provisions.

Article VI, Section 19 of the Constitution of the Commonwealth of Puerto Rico which provides:

> "It shall be the public policy of the Commonwealth to conserve, develop and use its natural resources in the most effective manner possible for the general welfare of the community; to conserve and maintain buildings and places declared by the Legislative Assembly to be of

historic or artistic value; to regulate its penal institutions in a manner which effectively achieves their purpose and to provide, within the limitation of available resources, for adequate treatment of delinquents in order to make possible their moral and social rehabilitation."

Section 11(29) of the Public Policy Environmental Act of the Commonwealth of Puerto Rico, 12 L.P.R.A. 1131(29)

"§1131. Functions and duties

"The Board on Environmental Quality shall have, among others, the following duties, powers and functions:

* * *

"(29) To bring, represented by the Secretary of Justice, by the Board's attorneys, or by a private attorney contracted for such purpose, civil actions for damages in any court of Puerto Rico or the United States of America to recover the total value of the damages caused to the environment and/or natural resources upon committing any violation of this chapter and its regulations. The amount of the judgment collected to such effect shall be covered into the Special Account of the Board on Environmental Quality.

It also involves the following statutory provisions which are set forth in full length in Appendix B hereto, pp. 28-29 infra. 46 U.S.C. 740; 12 L.P.R.A. 595.

STATEMENT OF THE CASE

A. *Summary of Pertinent Facts*

1. *The Grounding and Subsequent Oil Spill*

On March 15, 1973, the SS ZOE COLOCOTRONI departed La Salina, Venezuela, with a full load of crude oil for Guayanilla, Puerto Rico. At 0110 hours on March 18, eighteen or twenty miles due south of Puerto Rico the ship's master

was not able to establish her position. At 0300 hours on March 18 the ZOE COLOCOTRONI ran out of water and went hard aground 3 miles due south of Puerto Rico. About 10 minutes after the grounding the ZOE COLOCOTRONI dumped 5,170.1 tons or 1.5 million gallons of oil into the sea. This oil, displaced by the elements, came ashore at Bahia Sucia, a natural shoreline mangrove forest in the southwestern tip of Puerto Rico. The oil devastated the entire Bay. The cause of the grounding was the fact that the ship's crew was hopelessly lost while making the approach to Puerto Rico. The factors which directly contributed to this condition were (1) lack of proper charts and nautical publications onboard, (2) the failure of the master to properly compensate for a westerly set in the current, (3) inoperative or defective navigational equipment among which were: (a) the gyro compass, (b) the gyro compass recorder, (c) the fathometer, (d) the fathometer recording device, (e) the radio direction finder, (f) the radar and (g) the radio equipment; (4) an incompetent crew (the third officer, the radio operator and two engineers were unlicensed) and (5) the failure to post a bow lookout. The ZOE COLOCOTRONI was a rust bucket. (58a-67a)

B. *The Proceedings Below*

1. *Proceedings in the District Court*

Plaintiffs claimed clean up costs and damages to the natural resources of Bahia Sucia. Admiralty and maritime jurisdiction of the District Court was invoked pursuant to 28 U.S.C.A. 1333. (7a)

West of England moved to quash the service of process made pursuant to the Puerto Rico Long Arm Statute and to dismiss the action. This motion was denied by the District Court in its opinion and order of January 14, 1977. (109a)

On October 21, 1977, the District Court struck defendants' pleadings on the issue of liability and their petition for ex-

oneration from and/or limitation of liability. The District Court left open the question of damages. (103a, 58a)

The District Court found that defendants had exhibited "bad faith and callous disregard of their responsibilities in this litigation", characterized defendants' conduct as "an affront to this court's dignity" and found that the conduct had severely prejudiced plaintiffs' preparation of their case as well as the court's attempts to assure that the trial proceeded as scheduled. (107a). The facts upon which those findings were based appeared fully stated by the Court of Appeals' Opinion of August 12, 1980. (16a-24a)

The trial on the question of damages commenced on November 7, 1977 and lasted six weeks.

On August 15, 1978, the District Court ruled that the Commonwealth of Puerto Rico had standing to sue by reason of its proprietary interest in the affected property and pursuant to the common law doctrines of "trustees of the public trust" and "parens patriae". The Court also held that the Environmental Quality Board had a cause of action arising under Section 11(29) of the Puerto Rico Public Policy Environmental Act, 12 L.P.R.A. 1131. (67a-70a) The District Court found that 4 years after the spill there was still 23 acres on the west side of Bahia Sucia containing oil impregnated sediments. (86a) The Court further found that over 92 million marine organisms were destroyed as a result of the oil spill. (85a) Based on the uncontradicted evidence in the record, the Court concluded that said animals could not be replaced at a cost of less than six cents per animal. The district Court rejected part of plaintiffs' restoration proposal of restoring the area by removing the oil impregnated sediments and replacing said sediments with new material, but did grant plaintiffs the cost of replanting 23 acres of mangrove and the cost of monitoring the plantation for five years. Thus, the court entered judgment in favor of the plaintiffs in the amount of $78,108.89 for plaintiffs' proven and unreimbursed clean up costs; $559,500 for replanting 23

acres of mangrove and monitoring them for five years; and $5,526,583.20 for the replacement cost of the marine animals that were destroyed by the oil spill. (85a-86a)

After filing a timely appeal, defendants asked the Court of Appeals for permission to file in the District Court motions under Rule 60(a) and 60(b) of the Federal Rules of Civil Procedure for the correction of alleged clerical mistakes and for relief from judgment. The Court of Appeals, on June 11, 1979, held that leave was not required prior to filing a Motion for Relief in the District Court under Rule 60(b). (49a-56a)

Defendants then filed Rule 60(a) and (b) Motions before the District Court. In support of their Motion they filed voluminous expert studies and affidavits that they labeled newly discovered evidence. The Commonwealth, on the other hand had to rebut all this alleged newly discovered evidence. In essence the defendants retried the case before the District Court on documents.

On August 8, 1979, the District Court denied defendants' Rule 60 Motions. The Court expressed its serious reservations as to whether the Motions complied with the requirements of Rule 60(b) (2), but in any event examined defendants' materials and found nothing that would move it to alter its original decision.

2. *The Proceedings in The Court of Appeals*

The United States Court of Appeals affirmed the District Court's findings as to *in personam* jurisdiction over the insurance company (24a-30a) and that the E.Q.B. had cognizable cause of action to recover the total value of the damages caused to the environment and/or the natural resources. (31a-33a) The Court of Appeals, however, inexplicably vacated the District Court's award of damages as measured on the basis of six cents per animal (45a-46a) and remanded the case to the District Court for reevaluation of the

damages. (47a-48a) The Court of Appeals set the following standard for the District Court's reevaluation of the damages:

> "We think the appropriate primary standard for determining damages in a case such as this is the cost reasonably to be incurred by the sovereign or its designated agency to restore or rehabilitate the environment in the affected area to its pre-existing condition or as close thereto as is feasible without grossly disproportionate expenditures."[2]

REASON FOR GRANTING THE WRIT

I. THE COURT OF APPEALS IN VACATING THAT PORTION OF THE DISTRICT COURT'S JUDGMENT AWARDING THE E.Q.B. THE REPLACEMENT VALUE OF THE MARINE ANIMALS DESTROYED BY THE ZOE COLOCOTRONI OIL SPILL DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

A significant percentage of the oil spill volume results from tanker accidents, the great majority of it from major ones such as the almost 300,000 tons of oil spilled in the recent ATLANTIC EMPRESS and AEGEAN CAPTAIN collision off Trinidad in 1979, the 220,000 tons of oil that escaped from the AMOCO CADIZ off the coast of France in 1978, the 119,000 tons that spilled from the TORREY CANYON off the coast of Britain in 1967, the 28,000 tons that were discharged off the coast of Massachusetts in 1976 and the 5,000 tons released by the ZOE COLOCOTRONI in 1973. *Oil Spill Intelligence Report*, Center for Short-Lived Phenomenon, Cambridge,

[2] In this statement we refer primarily to those facts and parts of the opinions below relating to the evaluation of damages, which were the subject of the Court of Appeals remand to the District Court. For a fuller treatment of the facts and proceedings see the Commonwealth's Brief in Opposition in No. 80-758 this term.

Massachusetts (September 7, 1979); *Petroleum in the Marine Environment* (May 31, 1975).

The economic impact of such casualties cannot be overstated. The damages caused by them are obviously of great proportion.

This Petition for a Writ of Certiorari poses a question of law which should be settled by this Court. The economic and environmental impact of unsettled law will be damaging to the balance of the interests of the shipping economy and the environmental oriented mandate contained in Federal and state legislation.

Simply stated the question is whether a massive destruction of marine animals, caused by an oil spill, has a replacement cost or value from the standpoint of a tortious damage determination.

A. *The Court of Appeals Decided an Important Question of Federal Law.*

The tortious act being complained of was committed at sea about three miles south of Puerto Rico. The impact of the tort, however, was felt ashore along the shoreline of Bahia Sucia.

In 1948 the Congress enacted the Extension in Admiralty and Maritime Jurisdiction Act, 46 U.S.C.A. 740 to extend the admiralty and maritime jurisdiction of the Federal district court to include such ship-to-shore torts. The United States District Court for the District of Puerto Rico in respect to this case had admiralty and maritime jurisdiction. Consequently, any argument that the rights and remedies being sought by the plaintiffs in this case are not governed by the General Admiralty and Maritime Law of the United States would be unavailing.

The Court of Appeals refused to recognize the E.Q.B.'s right to the District Court's award of damages which would have compensated it for the replacement cost of the marine

animals destroyed by the spill. That part of the Court of Appeals' decision is in contravention with the general principles of admiralty and maritime law that "...persons injured on their property by collision, are entitled to *full indemnity* for their loss". (Emphasis added) *The Baltimore*, 75 U.S. 377, 387 (1869) stated it another way:

> "Where property is destroyed by wrongful act the owner *is entitled to its money equivalent and thereby to be put in as good position pecuniarily as if his property had not been destroyed.*" *Standard Oil Corp.* v. *Southern Pacific Co.*, 268 U.S. 146, 155 (1925). (Emphasis added)

Moreover, that part of the Court of Appeals' decision is in contravention with Section 11(29) of the Environmental Policy Act of Puerto Rico, which clearly states that the E.Q.B. is entitled to "...*the total value* of the damages caused to the environment and/or natural resources". (Emphasis added) 12 L.P.R.A. 1131(29)

Any argument that this Puerto Rico statutory right of action is not recognized by the Admiralty and Maritime Law of the United States would also be unavailing. *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 341-342 (1972).

When a harm is inflicted in the territorial waters of a state, the Admiralty and Maritime Law will recognize state laws enacted to create rights and liabilities with respect to conduct in those waters when the state action is not in conflict with Federal laws or the essential features of an exclusive Federal jurisdiction. *Just* v. *Chambers*, 312 U.S. 383, 391 (1941); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 373-374 (1959).

Rather than being in conflict with a Federal law, the Puerto Rico statute is in harmony with it. *Askew* v. *American Waterways Operators, Inc., supra.* The E.Q.B.'s right of action fell under the Federal Admiralty and Maritime jurisdiction of the

District Court. In the light of the above stated, the E.Q.B. respectfully submits that the Court of Appeals decided an important question of Federal law which has not been, but should be, settled by this Court. The question is so important to Puerto Rico and the coastal states that it requires this Court's intervention.[3]

When this suit was instituted the right of action and remedy existed, both under the General Admiralty and Maritime Law of the United States and a Puerto Rico statute. However, because of the newness of the question and lack of precedence, no mechanism had been fashioned that could serve as a guide for determining the remedy and measure of damages. The Court of Appeals established the standards for determining the cost of restoration of the affected area and recommended alternative methods in the event restoration was not feasible. The Court of Appeals, however, refused the E.Q.B.'s claim for the replacement cost of the marine animals killed by the oil spill. It felt they were "small, commercially valueless creatures". (44a)

Yet, the Court recognized the fact that the E.Q.B. had pursued two different remedies — (1) restoration cost, that is, what it will cost to remove the oil impregnated sediments, replacement of those sediments with clean sediments, replanting the mangroves and monitoring the plantation for a time long enough to insure its success and (2) the replacement cost of the killed animals. (43a)

In fashioning a remedy for restoration, the Court of Appeals borrowed from the suggestions provided by the Federal legisla-

[3] The following States interested in the outcome of this case filed in the Court of Appeals Amicus Briefs together with the United States: Commonwealth of Virginia; Commonwealth of Massachusetts; State of Maine; State of Florida; State of Texas; State of Maryland; State of North Carolina and State of New York. Also, The National Wildlife Federation and The Natural Resources Defense Council, Inc. joined in the Amicus Briefs.

tion.[4] But while construing one of the statutes it borrowed from, it interpreted it as meaning "replacement as component in a practical plan for actual restoration" (44a) and thus denied the undisputed replacement value of the destroyed animals in the instant case.

The example the Court of Appeals poses, to explain its decision, is very interesting. In it, it recognizes the State's right to replacement value for "wild birds, game animals or such other creatures as would not be expected to regenerate naturally within a relatively finite period of time even with appropriate restoration". (44a) The Court of Appeals conditioned the State's right to the replacement value of animals in the wild, to whether or not they would regenerate naturally within a relatively finite period of time after appropriate restoration. Simply stated, if, with evidence, the Court convinces itself that Nature will replace the animals after appropriate restoration the polluter who negligently brought in the rust-pot full of oil which caused the spill, would be home free. To let Nature carry the burden is definitely not realistic, not to say illogical. If it is difficult to prove the number of taxa, animals destroyed and their replacement cost, more difficult it is to envision after appropriate restoration a fully replenished West Mangrove with all the animals lost, to the same condition in which it was prior to the spill. This is an unprovable fact. Any evidence offered to prove it would be conjectural and speculative.

In this respect the District Court found that "5 years after the spill oil was still much in evidence particularly in the West Mangrove area visited by the Court" (84a) and "the evidence is overwhelming to the effect that the sediments in and around the West Mangrove continue to be impregnated with oil..." (85a-86a) And the Court of Appeals stated that "the District Court found that the once flourishing natural environment of

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[4] The Clean Water Act, 33 U.S.C. 1321(f) (5); The Outer Continental Shell Lands Act, 43 U.S.C. 1813(a) (2) (C), 1813(a) (2) (D), 1811(9) and The Submerged Lands Act, 43 U.S.C. 1301(e)

the West Mangrove had been seriously damaged by the oil, to the point where some of the underlying sediments were no longer capable of supporting any but the most primitive form of organic life, such as worms". (36a)

Assuming arguendo, that Nature will replace those marine animals, how long is a "relatively finite period of time"? Dr. Barbara Welsh, at trial, testified that the oil would be in the sediments for decades because of the existing anaerobic condition there. (TR 287F-288F)[5] At the time of trial not all the animals had come back to the West Mangrove of Bahia Sucia. This is a fact no one can deny.

The Court of Appeals considered the Bahia Sucia animals "small, commercially valueless creatures" (44a), the fact notwithstanding that the record showed that among the animals counted were crustaceans, mollusks, echinoderms and polychaetes, among which were fish larva, shrimp, crabs, lobsters, conch, snails, oysters and others. See 72a-73a. Can it seriously be doubted that shrimp, crabs, conch, lobsters, snails, oysters and fish (and other marine animals in the wild) have an economic value?

Upon coming ashore, the oil decimated the animals. The District Court stated:

> "Bahia Sucia was heavily impacted by oil as a result of the Zoe Colocotroni incident. Most affected were the West Mangrove and beach areas and consequently, the flora and fauna of that locale. Immediately after the spill, and as a result thereof, the mangrove root communities in that area were decimated. A similar result was experienced by the sea grass communities in those impact areas and the crab populations in the flats. Additionally, various areas of red mangrove in the West Mangrove

[5] The first 310 pages of the trial transcript appear cited in the Appendix, reproduced in the Court of Appeals, as "TR. F.". The pages of that transcript are cited here in the same fashion.

were affected by the spill, and as a result the mangrove mortality in this area was significantly increased.

"Even at present the mangrove community in this impact area shows a significant reduction in the number of species of macrobiota, the number of molluses and crustaceans, the epiflora cover, the number and frequency of epiphyte species, and the number of species and population density of epibenthic and infaunal molluscs and crustaceans. The seagrass community shows a significantly altered pattern of plant biomass and in the number of species and population density of macro biota. This community, however, shows great relative recovery than the West Mangrove community." (84a)

For the Court of Appeals a natural habitat, in the coast of any coastal state, of lobsters, shrimp, clams, oysters, conch, fish, snails, eels, crabs, turtles and the other underlying animals on which the first group prey on or predate has no value because they are "small, commercially valueless creatures". (44a)

A natural habitat consists of two main components, (1) the natural setting, that is, the bay or cove, the land, the swamp, the sand and sediments and (2) what lives in it, the fauna and flora. In essence, the Court of Appeals decided to rehabilitate the setting by restoring the flora but as to the fauna it decided, however, to let Nature do it. If Nature fails to place the animals back, let society take the loss, not the polluter. That part of the decision is arbitrary.

Other statutes from which the Court of Appeals borrowed for fashioning the restoration remedy, were the Outer Continental Shell Lands Act Amendments of 1978, supra, and the Submerged Lands Act, supra. While discussing these statutes the Court cited from it that "Congress has determined that *it is desirable* to provide for environmental damages *apart from the commercial loss* ordinarily measured *by a market-value yardstick* suffered by landowners and/or exploiters of natural

resources". (Emphasis added) But this language failed to move the Court of Appeals. It still held that the E.Q.B. need not be compensated because the destroyed animals were "small, commercially valueless creatures".

The Constitution of the Commonwealth of Puerto Rico provides that the Government conserve, develop and use its natural resources in the most effective manner possible for the general welfare of the community. Sec. 10, Article VI.

The Legislature of Puerto Rico, in Section 3 of the Fisheries Act of 1936, 12 L.P.R.A. 43 provided:

> "All species of fish, mollusks, crustaceans, aquatic mammals, aquatic plants and all other species comprising the marine, lacustrine and fluvial fauna and flora, are hereby declared to be the property of the Commonwealth of Puerto Rico and of common ownership and public use. They may be freely fished, caught, utilized, or traded, subject to the limitations of Sections 41-63 of this title and of the regulations for their enforcement."

By express enactment the Legislature made, the animals destroyed in Bahia Sucia, the property of the Commonwealth of Puerto Rico. For the state, that property, in the wild, does not necessarily have to have an intrinsic commercial value. However, once caught by the fisherman it becomes commercially valuable. But that property,in the wild, is closely related to some value measurable in terms of money.[6]

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[6] Access to fisheries is free as there is no authority, State or Federal, imposing a fee on fishermen for each fish caught. The price of the fish will include only labor, transportation, preparation cost and profit to the fishermen. There is no allowance for any intrinsic value of the fish but can it seriously be doubted that the fish and other marine resources have an economic value? A huge structure of industries has been built upon the economic base of the United States fisheries even though no price is charged for the intrinsic value of fish. If those marine habitats were destroyed, all economic

II. THE COURT OF APPEALS' DECISION VACATING THAT PORTION OF THE DISTRICT COURT'S JUDGMENT AWARDING THE E.Q.B. THE UNDISPUTED REPLACEMENT VALUE OF THE MARINE ANIMALS DESTROYED BY THE ZOE COLOCOTRONI OIL SPILL IS CONTRARY TO THE CLEAR LANGUAGE OF THE STATUTE AUTHORIZING THE E.Q.B. TO RECOVER THE TOTAL VALUE OF THE DAMAGES CAUSED TO THE ENVIRONMENT AND/OR NATURAL RESOURCES, AND IS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL INTERPRETATIONS SO AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A) *The Standard of Proof Required by the Court of Appeals Goes Beyond That Required by the E.Q.B. Statute and the General Principles of Tort Law.*

The District Court found that Plaintiffs' proven claim for damages to marine animals covered an area of about 20 acres in and around the West Mangrove. That the surveys conducted by the plaintiffs reliably established that there was a decline of approximately 4,605,486 animals per acre as a direct result of the oil spill and that the uncontradicted evidence established that there is a ready market with reference to biological supply laboratories allowing a reliable calculation of the cost of replacing these animals. The uncontradicted evidence during the trial showed that the lowest possible replacement cost figure is 6¢ per animal with many species selling from $1.00 to $4.50 per individual.

Defendants state that it is an undisputed fact that "mangrove trees and marine organisms were killed by the oil spill". (Defendants' Petition No. 80-758, p. 3).

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activities based upon the utilization of those habitats would be destroyed. This is in essence why the E.Q.B. insists that the destroyed marine animals being claimed in this litigation have a replacement value.

While the Court of Appeals recognized the right of the E.Q.B. to recover the total value of the damages caused to the environment and/or natural resources upon a violation of the Anti-Pollution Provision, 12 L.P.R.A. 1131 24 L.P.R.A. 595 and that implicit in the language of said section is a determination not to restrict the state to ordinary market damages, it erroneously vacated the District Court's award of $5,526,583.20 for the 92 million marine animals proven killed by the ZOE COLOCOTRONI oil spill.[7]

The Court's disallowance of this portion of the judgment was premised on the fact that plaintiffs had not come forth with an actual restoration plan whereby they proposed to purchase 92 million invertebrate animals for actual introduction into the sediments (43a, 44a). The Court accepted that replacement value can be a suitable measure of damages.[8] However, it then went on to state that replacement value must be interpreted as meaning "replacement as a component in a practicable plan for actual restoration".(44a) It is submitted that neither the clear language of the statute, 12 L.P.R.A. 1311(29), nor traditional standards for measuring damages place this burden on the plaintiffs. The Court of Appeals recognizes on one hand "that technology available to remove oil and to restock plant and animal communities is very limited at present, and development of such a technology would be a long range undertaking. ...In most instances, the

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[7] The Court of Appeals rejected this element of damages not because plaintiffs' evidence was insufficient to establish that 92 million creatures were destroyed and that six cents represented an appropriate cost estimate, but rather because it was unable to endorse the theory of damages in support of which this evidence was advanced. (45a)

[8] Quoting from the legislative history of the Clean Water Act, 33 U.S.C.A. 1321(f)(5) which states in part that when the damaged or destroyed resource is irreplaceable (as an endangered species or an entire fishery) the measure of liability is the reasonable cost of acquiring resources to off-set the loss. (40a)

recovery of an ecosystem after an oil spill would occur, if at all, only through the slow processes of natural regeneration". (41a, footnote 23). Yet, inexplicably, on the other hand the Court requires that the plaintiffs formulate their claim for the marine animals killed within a practical plan for actual restoration.

It is submitted that if plaintiffs are not required to prove their damages with mathematical certainty, much less should they be required to prove with mathematical certainty how they intend to restore or replace the diminution in the public trust attributable to the tortfeasor. *Israel* v. *Campbell*, 330 P2d 83 (1953); *Lavieri* v. *Ulysses*, 149 Conn. 396, 18 A2d 632 (1962).

This Court has stated that the ascertainment of value is not controlled by artificial rules. It is not a matter of formula, but there must be a reasonable judgment having its basis on a proper consideration of all the relevant facts. *Standard Oil, supra.* Moreover, the determination of damages is a factual question to be determined by the tryer of facts based on the evidence before it. The same should not be set aside even though the Appellate Court might have reached a different result or used a different method of calculation. *Gardner* v. *Bulk Carriers* (C.A. 4th 1964) 333 F2d 676.

The District Court followed the mandate of *Standard Oil, supra.* It awarded the E.Q.B. and the Commonwealth the replacement value of the animals killed by the oil spill. The District Court reached its findings on damages based on the massive proof in the record, as well as its two on-site views of the area. The District Court clearly found that if the Commonwealth was to be made whole it must receive compensation to restore the affected area, as well as compensation for the marine animals that once existed there. Money damages for the wildlife destroyed and an award to restore the affected sediments and mangrove communities are but opposite sides of the same coin. One without the other falls drastically short of

placing the plaintiffs in the position they would have been had there been no tort.

As stated by the District Court in its order denying defendants' 60(b) motion:

> "In the present action we have found a recoverable wrong. It is an ancient, elementary, and hardly novel principle of law that a transgressor correct or compensate that party which he has injured. Where the assessment of the amount of recovery is a complex question by reason of the facts and the relative newness of the field in question, the Court's task will undoubtedly be more difficult. But this can hardly excuse the fashioning of an adequate remedy. And in terms of difficulty, we cannot compare the present case's situation with that encountered in the valuation of human life or limbs, an every-day occurrence in the courts, on which subject no aid is received from available catalogues.
>
> "The law knows no magic formula for computation of an award of damages. What is required is only that damages awarded have their bases in the evidence presented before a court. Here there was sufficient evidence to sustain our findings. We are of the opinion that the method used, the 'lowest possible replacement cost', has support in the record and is a fair and equitable method of assessing damages under the particular setting of this case.

B) *In the Absence of Market Value of the Marine Animals, Replacement Cost is a Proper Measure of the Total Value of the Damages to Said Resources.*

It is undisputed that millions of marine animals died as a result of the oil spill. Unsupported contentions that these animals would probably replenish themselves naturally, if and when restoration, either artificial or natural, took place (44a)

is hardly compensating the plaintiffs for the damages they proved to have suffered. That damage may heal to some extent is no answer to the fact of its existence, nor is it relevant that these marine animals would not have a market value. Marketable or not they are of immense value to the Commonwealth's limited natural resources, and the Commonwealth is entitled to recover *the total value* of said damages.

The Court of Appeals clearly departed from the accepted and usual course of judicial interpretation when it required that the Commonwealth place its claim for marine animals within a practical plan for actual restoration especially so when the Court itself is aware that the technical knowledge to do so is very limited at present. The law is clear that if plaintiffs established the cause and existence of the damage, recovery will not be denied because such damages are difficult of assessment. *Hoffer Oil Corp.* v. *Carpenter*, 34 F.2d 589, 592 (1929); *Story Parchment Co.* v. *Paterson Paper Co.*, 282 U.S. 555 (1931); *Calkins* v. *F. W. Woolworth Co.*, 27 F.2d 314 (1928); *Feather River Lumber Co.* v. *U. S.*, 30 F.2d 642 (C.A. 9th 1929). Thus in situations where the property destroyed has no market value by which damages could be established but would have important non-comercial significance, the courts have used the replacement cost as a yardstick.[9]

[9] *Standard Oil, supra* (lost vessel valued at current cost of reproduction; *Williams* v. *Gallagher Transfer & Storage*, 170 La. 461, 128 So. 277 (1930) custom built bedroom set valued at cost of having another set constructed; *Jay-Ox, Inc.* v. *Square Deal Junk Co.*, 208 Kan. 856, 494 P2d 1103 (1972) (cost of restoration used to value gas cylinders without market value); *New Jersey Power & Light Co.* v. *Mabee*, 41 N.J. 439, 197 A.2d 194 (1964) (full replacement cost of power line pole allowed); *Beaufort & Morehead R. Co.* v. *The Damyank*, 122 F. Supp. 82 (1954) (pilings destroyed and damages set at cost of replacement); *Feather River Lumber Co.* v. *United States*, 30 F2d 642 (9th Cir. 1929) (damages measured by cost of replacing young timber growth destroyed by fire); *Brunett* v. *Sledgework*, 149 NW2d 578 (1967) (where the measure of damages as to young mink destroyed was held to be the fair market value as measured by reasonable cost of replacing the mink with comparable animals).

In the instant case the replacement value was established by reference to numerous biological supply catalogs as well as a price list prepared by the State of California of values of marine animals prepared by the State in 1970. Based on this uncontradicted evidence, Dr. Sorensen testified that it would be impossible to replace any of the animals killed as a result of the Bahia Sucia oil spill at a unit cost of less than six cents (A3023-3026). The District Court did its best to assign a value to these animals based on the evidence before it and it did so most conservatively using the lowest figure of record of six cents per animal when many species sold from $1.00 to $4.50 per individual.

The use of table of values to establish environmental damages for specific marine animals is hardly novel or new.[10]

In fact, replacement cost is being used in many state programs established to recover for living, natural resource damage.[11] The Florida program to recover such amounts was recently upheld. *Department of Pollution Control* v. *International Paper Co.*, 329 S.2d 5 (Fla. 1976). In the same case Florida utilized a table of values established for specific marine animals. The Florida Supreme Court found the use of a table of values to be constitutional and allowed the assess-

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[10] As stated by Dr. Sorensen, an environmental economist who testified during the trial, lists containing the replacement cost of marine animals have been used by the State of California to assess the value of the natural resources damaged. (A2148-2149)

[11] Florida (F.S.A. § 376.11(5) (c) (1974)); Maryland (A.C.Md. Natural Resources § 8-1411(f) (1974)); Massachusetts (M.G.L.A. c.21 § 27(10) (1973)); Mississippi (M.A.C. § 49-27-55 (1979 Supp.)); New Jersey (N.J.S.A. 58:10-23.11g(a)(2) (1979 Supp.)); New York (N.Y. Nar.L. 181(2) (b) (1979 Supp.)); North Carolina (N.C.G.S. § 143-215.90 (1979 Supp.)); Oklahoma (82 O.S.A. § 937(b) (1971)); Oregon (O.R.S. § 468.745 (1977)); Virginia (Va. Code § 62.1-44.15 (11) (a)); Washington (R.C.W. § 90.48.142 (1977). The previously cited statutory provisions are set forth in full in Appendix E to the Commonwealth's Brief in Opposition to Defendants' Petition in No. 80-758.

ment of damages based on the same. See also *State Ex-Rel, Pollution Control Co.* v. *Kerr, McGee Corp.*, 532 P2d 1386 (Okla. 1975).

Since the Commonwealth of Puerto Rico, through its Environmental Quality Board has been held to have a right to be made whole, and since the cost of replacing the marine animals shown to have been removed from the environment of Bahia Sucia by the District Court is an extremely conservative one and amply supported by the record, the same should be reinstated. Anything less would be contrary to the clear language of Section 1131 of 12 L.P.R.A. and contrary to the basic principles of tort recovery. We submit that the Court of Appeals erred in vacating this part of the judgment. *Sun Oil Co.* v. *Humble Oil & Refinery Co.* (C.A. 3rd 1970), 431 F.2d 1119, *cert. den.* 401 U.S. 1003; *Sanders* v. *Leech* (C.A. 5th 1946) 156 F.2d 486; *Gardner* v. *Bulk Carriers* (C.A. 4th 1964) 33 F.2d 676.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Number: 252-73

THE COMMONWEALTH OF PUERTO RICO and the ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO
Plaintiffs

v.

THE S.S. ZOE COLOCOTRONI, her engines, appurtenances, etc., et al.,
Defendants

ORDER

Pursuant to the Orders of the United States Court of Appeals for the First Circuit, April 24, 1979 and June 11, 1979, Defendants have filed two Motions under Rules 60(a) and (b) of the Rules of Federal Procedure, 28 U.S.C., for the correction of clerical mistakes and the vacating of Judgment. In the present Order we entertain both Motions.

Separate analysis of each follows below.

I. *The Rule 60(b) Motion.*

Although Rule 60(b) is a liberal remedial rule which draws on the historical authority of a court to avoid injustice it has its time, place, and circumstances. See gen.: 7 Wright & Miller, *Federal Practice and Procedure*, §2857 *et seq.*; 7 *Moore's Federal Practice*, §60.18(8)-§60.24(5). It is not an invitation for a *de novo* assestment of the evidence, *Williams* v. *McKenzie*, 576 F. 2d 566, 570 (C.A. 4, 1978), or an opportunity to relitigate, *Posttape Associates* v. *Eastman Kodak Company*, 68 F.R.D. 323 (E.D.Pa., 1975), nor is it a substitute for an appeal, *Fackelman* v. *Bell*, 564 F. 2d 734 (C.A. 5,1977). Extraordinary relief, such as contemplated by Rule 60(b), calls for ex-

ceptional circumstances. See: *Horace* v. *St. Louis Southwestern Railroad Company*, 489 F. 2d 632 (C.A. 8, 1974).

In the instant action Defendants, citing different parts of the record and proceedings, have filed for relief from a judgment which in their view should not stand because of newly discovered evidence, surprise, mistake, fraud, and misrepresentation and misconduct by Plaintiffs.

Central and foremost in Defendants claims of entitlement to relief is the argument that a mistake was committed in the calculation of the area which sustained damage. From this, Defendants follow that the calculations as to the total animal and plant destruction must also be erroneous. In our decision of August 29, 1978 we made a finding of damage to marine organisms in approximately 20 acres and damage to mangrove area covering about 23 acres. We believed then, as we do now, that our study of the evidence submitted and our examination during the on site inspections justified such a finding. Nothing added by Defendants as an afterthought convinces us to the contrary.

As further grounds for relief Defendants state that they were surprised, misled, and misrepresented to by Plaintiffs. Surprise is claimed on the specifics of Plaintiffs' theory of recovery. Misrepresentation is alleged on the nature and source of authority for such a theory. Defendants state they were misled when Plaintiffs changed their claim for relief. With respect to these contentions we simply state that the amended complaint sufficiently put Defendants on notice as to what it was that compensation was sought for, and that the record of discovery proceedings would reveal that Defendants had adequate notice as to what this compensation encompassed. We cannot label these contentions a "surprise" if Defendants chose not to further investigate, pursue, or follow up on information it had received in the pleadings and during discovery.[1] Nor can we

[1] Curiously enough no allegation is made under the "excusable neglect" provision of Rule 60(b).

label them "misleading" if Defendants chose to disbelieve and pursue another avenue of litigation strategy. "Rule 60(b) is not to be invoked to give relief to a party who has chosen a course of action which in retrospect appears unfortunate or where error or miscalculation is traceable really to a lack of care." *Sadowsky* v. *Bombardier Ltd.*, 530 F. 2d 615, 618 (C.A. 7, 1976).

The argument that Plaintiffs misrepresented their theory of recovery is close to the argument that we erred in the method we adopted to calculate the amount of damages. The gist of both is that there is no authority for such a formula for relief and that Plaintiffs' witness misrepresented that there was.

In the present action we have found a recoverable wrong. It is an ancient, elementary, and hardly novel principle of law, that a transgressor correct or compensate that party which he has injured.[2] Where the assestment of the amount of recovery is a complex question by reason of the facts and the relative newness of the field in question, the Court's task will undoubtedly be more difficult. But this can hardly excuse the fashioning of an adequate remedy. And in terms of difficulty, we cannot compare the present case's situation with that encountered in the valuation of human life or limbs, an everyday occurrence in the courts, on which subject no aid is received from available catalogues.[3]

The law knows no magic formula for computation of an award of damages.[4] What is required is only that damages

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[2] See gen.: Wigmore, "Responsibility for Tortious Acts: Its History", 7 HARV. L. REV. 315, 1383, 448 (1894).

[3] Note: 74 Am.Jur. 2d., Torts, §74.

[4] Upon close examination the method we adopted is in fact no radical deviation from traditional norms. In most general terms damages for "physical harm to [property] is closely tied with the concept of value... Value necessarily involves the idea of some standard by which it can be determined. What we are looking for is the financial equivalent of the property or the harm to it. ... The theory underlying this is that the Plaintiff, given his financial equivalent,

awarded have their bases in the evidence presented before a Court. Here there was sufficient evidence to sustain our findings. We are of the opinion that the method used, the "lowest possible replacement cost", has support in the record and is a fair and equitable method of assessing damages under the particular setting of this case. To the extent the Defendants argue that the method of damage computation is a judicial mistake, that we wrongly decided a point of law, the issue is technically the proper subject for adjudication on appeal rather than review on a Rule 60(b) Motion. See: *Silk* v. *Sandoval*, 435 F. 2d 1266 (C.A. 1, 1971) cert. den. 402 U.S. 1012 (1971).

The last areas of concern in Defendants' Motion for relief concern the scientific accuracy of tests performed and submitted into evidence and objected references to certain catalogues which set or did not set market values on the organisms destroyed in the case before us. With respect to these points Defendants have submitted: the report of an expert done after the entry of Judgment, and affidavits from nine persons involved in some facet of the biological supply field. Both submissions are impressive examples of steps that should have taken place prior to trial. During trial these concerns should have properly been the subject of cross examination and rebuttal evidence. The "mere second thought" of a litigant does not, however, compel Rule 60 (b) relief. *Mayberry* v. *Maroney*, 529 F. 2d 332, 337 (C.A. 3, 1976). Having examined Defen-

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can go out on the open market and replace the property by buying other property freely offered for sale." Prosser, *Cases and Materials on Tort* (Foundation Press, 1971) p. 1069. The validity of this general principle is not diminished by the uniqueness of the market or the non-salability of the object. See *Id.*, at p. 1071. Just as Defendants argue that the "lowest replacement cost" is unfounded as resulting in too high an award, Plaintiffs may argue that it was too low. Arguments of this type fall under no category of relief under Rule 60(b).

dant's materials[5] we find nothing that would move us to alter our original decision.

II. *The Rule 60(a) Motion.*

Defendants sought, and were granted, leave to file a Rule 60(a) Motion, correction of clerical mistakes, and instead now seek relief more properly brought pursuant to Rule 10(e) of the Fed.R.App. P. The issue, succinctly, is the correction of the record on appeal.

Under Rule 10(e) the parties may by stipulation direct that an omission or misstatement be corrected. From Defendant's Motion and Plaintiffs' opposition we find that such is the case with respect to six of the contested items that make up the record on appeal. The following, on stipulation, shall be STRICKEN from the record.

(1) Exhibit 50 a Transcript of Trial Cr. 61-73.
(2) Exhibit 50 b Certified copy of Information and Judgment in Criminal 61-73.
(3) Exhibit 39 The Ecology of A Mangrove (Booklet)
(4) Exhibit 43 Mangroves of Arid Environments in P.R. (Booklet)
(5) Exhibits 20 a and 20 c Field Notes.
(6) The items listed in the Supplemental Index transmitted to the Court of Appeals on May 1, 1979.

All other issues regarding this Motion deal with whether or not the items in dispute were admitted into evidence. Defendants seek correction of the record by striking these items. Plaintiffs oppose by stating that they were admitted. Counsel for Defendants has filed an affidavit wherein he states that it was his understanding that under this Court's Order he was to

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[5] A great deal of Defendants' documents,reports, affidavits, and other exhibits are filed as "newly discovered" evidence. Although we have examined and considered them on ruling on this Motion we have serious reservations that they qualify as that type of "evidence which by due diligence could not have been discovered in time to move for a new trial", or that with due diligence could not have been presented at trial. Cf. *Posttape Associates* v. *Eastman Kodak Company*, supra at p. 327.

meet with opposing counsel and the Courtroom Clerk and mark proposed exhibits for identification purposes only. This was not the Order of this Court. Further this is a completely and totally erroneous interpretation of the same. The parties were to mark items as to which there was no objection as Exhibits; if there was an objection to its admissibility it was to be marked as an identification. See esp.: pages 122-123 of the transcript of Trial Proceedings. This is part of the Local Rules of this Court, see Local Rule 9, and it has always been the operating policy of this Judge.

For all the above-cited reasons the Motion for Relief from judgment, Rule 60(b), is DENIED. The Motion for Correction of the Record, except as otherwise stipulated and noted in this Order, is DENIED. The Clerk of the Court is instructed to insure that the Clerk of the Court of Appeals for the First Circuit and all counsel of record are expeditiously notified.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 8th day of August, 1979.

/s/ JUAN R. TORRUELLA
JUAN R. TORRUELLA
U. S. DISTRICT COURT JUDGE

APPENDIX B

46 U.S.C.A. § 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act; *Provided further*, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

June 19, 1948, c.526, 62 Stat. 496

12 L.P.R.A. § 43. Ownership of fish

All species of fish, mollusks, crustaceans, aquatic mammals, aquatic plants and all other species comprising the marine, lacustrine and fluvial fauna and flora are hereby declared to be the property of the Commonwealth of Puerto Rico and of common ownership and public use. They may be freely fished, caught, utilized, or traded, subject to the limitations of sections 41-63 of this title and of the regulations for their enforce-

ment. May 13, 1936, No. 83, p. 438, § 3; July 1, 1953, No. 118, p. 458, § II, eff. July 1, 1953.

24 L.P.R.A. § 595

It shall be unlawful for any person, directly or indirectly to throw, discharge, pour or dump or permit to throw, discharge, pour or dump into the waters, any organic or non-organic material capable of polluting or leading to the pollution of said waters as to place them out of the minimum standards of purity that the Secretary of Health may establish under Section 599 of this Title.

No. 80-979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE COMMONWEALTH OF PUERTO RICO and THE ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO,

Petitioners,

-against-

THE S.S. ZOE COLOCOTRONI, MARBONANZA COMPAÑIA NAVIERA, S.A., COLOCOTRONI LTD., COLOCOTRONI BROTHERS, S.A., THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG) and THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LONDON) LIMITED,

Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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January 14, 1981

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APPENDIX I:

Dr. Sorensen's Calculation of Damages for "Replacement" of Marine Organisms

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Defendants, respondents to this cross-petition, incorporate herein by reference the statement of the case set forth in the petition for a writ of certiorari, No. 80-758. The specific facts relevant to the question presented in the cross-petition are set forth below.

1. The District Court's Damage Award for "Replacement" of Marine Organisms

Plaintiffs' third and final amended complaint alleged damage to "fish and wildlife" (A316)[1]; however, twelve days before the trial commenced, plaintiffs withdrew this claim and substituted a claim for damages for "replacing dead mangrove root animals." (A519).[2] During the trial, plaintiffs failed to offer any evidence of damage to mammals, fish, birds, reptiles or commercially valuable invertebrates.[3]

There was slender evidence of minimal damage to some invertebrates, mostly marine worms and fiddler crabs, but no evidence of any tally of the number of organisms killed other than plaintiffs' expert's sighting of about 200 dead fiddler crabs.[4] (Tr. 261F; A886). Plaintiffs conceded that the marine animals killed by the oil spill would be replenished through the processes of nature once the contamination had been reduced sufficiently for them to exist.[5] (Tr. 286F, 2425-2429, 2439). Indeed, in July, 1973, less than four months after the oil spill, plaintiffs' biologists found that "animals were returning to the mangrove areas" (A876) and that there already had been "an increase . . . in the number and species of crabs." (A884).

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1. Page references to the appendices submitted to the Court of Appeals are cited as follows: Appendix: "A__"; Supplemental Appendix: "SA__"; Appendix-Trial Transcript: "Tr.__." Page references to the Appendix to the petition for a writ of certiorari, No. 80-758, are cited "__a."

2. A damage action brought by commercial fisherman against defendants was settled prior to trial for $55,000. Jorge Acousta Lopez, et al. v. Marbonanza Compañia Naviera, S.A., et al., D.P.R. No. 303-74. (Tr. 1072).

3. Notwithstanding, plaintiffs now refer, *inter alia,* to "fish," "eels" and "turtles" (Cross-Petition at 12, 13, 14).

4. Plaintiffs' assertion that "[i]t is undisputed that millions of marine animals died as a result of the oil spill" is false. (Cross-Petition at 18). Nor is there any proof to that effect.

5. As the district court acknowledged, the contaminating petroleum residues have been attacked by bacteria and the elements and ultimately will be completely decomposed and rendered harmless. (83a-84a).

As their last witness, plaintiffs called Dr. Philip E. Sorensen, a self-styled environmental economist and skillful mathematician. In an exercise which demonstrates very well the hazards of total reliance on numbers, Dr. Sorensen concocted an imaginary claim for over $5.5 million in damages for "replacement" of marine organisms, which was accepted verbatim by the district court.

The data upon which Dr. Sorensen performed his mathematical gymnastics came from a superficial survey by plaintiffs' biological experts, the sole purpose of which was to study the effect of high concentrations of oil on marine organisms living in the sediments beneath mangrove trees. (Tr. 687; A945). Six ten-centimeter diameter core samples of the sediments were taken at four spots at Bahia Sucia where plaintiffs' chemist had found very high concentrations of oil,[6] and similar samples were collected from four points in a purported "control" area at Montalva Bay. The marine organisms found in each sample were identified and counted, and the results from the four Bahia Sucia "stations" were compared with the results from the control "stations". Surprisingly, more marine organisms were found in the samples collected at one of the polluted Bahia Sucia stations (Station 1) than at its paired control station. (A952). As expected, only one organism was found among the soil samples collected at the three other Bahia Sucia stations, while their paired control stations yielded 162 organisms, of which 113 were marine worms. (A955, A957, A959).

Dr. Sorensen disregarded the data from Station 1, which did not suit his purpose, and manipulated the data gathered at the three other stations as set forth in Appendix I hereto. First, based on an unsupported assumption that the Bahia Sucia sampling stations were biologically

6. Oil remained at these locations because they were sheltered from the flushing action of the tides. (A945).

identical to their paired control stations, he calculated an average decline in the number of marine organisms per Bahia Sucia station of 53.67, by subtracting 1 from 162 and dividing by 3. Then, using a mathematical conversion factor of 85,877.34, he extrapolated these numbers to one acre, calculating a surmised loss of 4,605,486 organisms per acre. Multiplying again by "20 acres", Dr. Sorensen calculated that 92,109,720 marine organisms had been lost.[7] (A1442-A1443). Plaintiffs' own evidence showed that the Bahia Sucia sampling stations were not representative of even one acre, much less 20 acres.[8] (*E.g.*, Plaintiffs' Exhibit 29; A1390). Nevertheless, the district court held that exactly 4,605,486 marine organisms had been lost in each of 20 acres, a total of exactly 92,109,720 marine organisms. (85a).

The district court also held that the 92 million marine organisms supposedly lost had a "replacement cost" of six cents each, on the basis of hearsay testimony by Dr. Sorensen. The $.06 figure was contrived by Dr. Sorensen, who testified that he had been guided by "about a dozen" biological supply catalogues, not offered into evidence, and a settlement agreement between the State of California and Pacific Gas & Electric Company involving the Diablo Canyon nuclear reactor, not in evidence. (Tr. 997). Although none of the biological supply catalogues offered for sale any species of marine organisms occurring at Bahia Sucia, Dr. Sorensen asserted that the catalogues showed

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7. The total conversion factor for this calculation was 1,717,546.80. (Appendix I). Thus every organism actually collected counted for over 1.7 million in the Sorensen total of 92,109,720.

8. Dr. Sorensen testified that he had been told that the Bahia Sucia sampling stations were representative of a 20 acre area (Tr. 1034-1035), when in fact they had been selected for study because they were *not* typical but were very heavily oiled. (A945, A967; Tr. 687.) Moreover, the "20 acre" area included over 16 acres in East Mangrove, which the district court found not to have been damaged by the oil spill. (A1389-A1390; Tr. 1032-1039; 46a, n.25).

that a market existed for those marine organisms and that the organisms could be sold for $.06 each. (Tr. 997-1001; A1443).

The Diablo Canyon settlement provided for the donation of $375,000 by PG&E to California in six installments to fund a study of abalone farming in settlement of all claims of any kind arising from the nuclear reactor project. (A2233). In a blatant misrepresentation of this agreement, which was not produced by plaintiffs, Dr. Sorensen testified that PG&E had paid damages of $1,000,000 for "killing of a large number of marine animals of a similar character at Diablo [Canyon]" pursuant to "120 pages of itemized prices," prepared by reference to biological supply catalogues.[9] (Tr. 997-998; A1443). In an affidavit submitted by plaintiffs in response to defendants' motion for relief from judgment, Dr. Sorensen recanted this testimony, admitting that his erroneous testimony had been based on hearsay. (A3023).

There is no evidence in the record that any of the species of marine organisms found in the West Mangrove area has ever been collected, sold or used for any purpose. (Tr. 2768). Nor is there any evidence that the Commonwealth has ever regulated the capture, killing or sale of such organisms. The marine organisms are free for the taking, but since there is no market for them, they are left undisturbed.

To calculate damages, Dr. Sorensen multiplied 92,109,720 marine organisms times $.06, yielding $5,526,583.20. (A1443). This exact figure was adopted by the district court as damages for the "cost of replacing" marine organisms killed by the oil spill. (85a).

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9. The State of California had prepared a list of all species of flora and fauna occurring along its Pacific coast with "estimated values" for everything from algae to whales. (A3022). This list was disregarded by PG&E in arriving at the settlement. (A2229). It does not include any species of marine organisms found at Bahia Sucia, Puerto Rico.

2. The Court of Appeals' Reversal of the Damage Award for Loss of Marine Organisms

Defendants urged the court of appeals to reverse on various grounds, including the absence of any authority supporting the district court's replacement cost theory of damages and the clear error of the district court's findings with respect to the number of acres damaged, the number of marine organisms killed, and the monetary value of the animals. The court of appeals did not reach the question whether these findings of fact were clearly erroneous, for it rejected the theory upon which damages had been awarded. (43a-45a).

Since plaintiffs acknowledged that they had no plan to purchase marine organisms for reintroduction into the sediments and that the organisms could not survive where oil still was present, the court of appeals termed the $5.5 million award a "purely abstract recovery." (45a). The court also recognized the distinction between restocking "wild birds or game animals or such other creatures as would not be expected to regenerate naturally within a limited period of time even with appropriate restoration" and "small, commercially valueless creatures which assertedly would . . . probably replenish themselves naturally if and when restoration—either artificial or natural—took place." (44a).

REASONS FOR DENYING THE WRIT

THE QUESTION PRESENTED FOR REVIEW DOES NOT MEET THE REQUIREMENTS FOR GRANTING CERTIORARI

It is noteworthy that even plaintiffs agree that this Court should review the court of appeals' decision on environmental damages. However, the question presented by the cross-petition clearly does not meet this Court's standards for granting certiorari. The court of appeals' ruling vacating the damages awarded for "replacing"

marine organisms is not in conflict with decisions of this Court, other federal courts of appeals, or the highest courts of any states, since there is absolutely no legal authority supporting the district court's bizarre and unprecedented theory of damages.

In fact, the court of appeals' rejection of the award of damages based upon a hypothetical "replacement cost" for common marine organisms, which naturally populate all appropriate habitats, is entirely consistent with the fundamental rule of damages quoted by plaintiffs in their cross-petition (p. 9):

> "Where property is destroyed by wrongful act, the owner is entitled to its money equivalent, and thereby to be put in as good position pecuniarily as if his property had not been destroyed." *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U.S. 146, 155 (1925).

Since the "money equivalent" of valueless organisms, which are not protected by the Commonwealth and are free for the taking, is zero, the district court's award would have placed plaintiffs in a much more favorable position than they were in prior to the accident.[10] The court of appeals correctly vacated this unjust windfall to plaintiffs;[11] it should have applied the familiar "diminution rule" and dismissed plaintiffs' environmental claims in their entirety, since there is no evidence that the impacted property is any less valuable now than it was before the oil spill. (See the Reply Brief in No. 80-758 at 5).

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10. Moreover, in the absence of a statute providing for penalties for killing marine organisms, plaintiffs are not entitled to recover damages for loss of such organisms apart from damages for injury to their real property. The Puerto Rico statute cited by plaintiffs, Section 3 of the Fisheries Act of 1936, 12 L.P.R.A. § 43 (1978), which purports to impart to the Commonwealth ownership of all species of animals in the wild, cannot vest such power, for a state does not own wild animals found within its boundaries. *Cf.* Hughes v. Oklahoma, 441 U.S. 322 (1979).

11. There is no legal authority for awarding damages for injury to property having no market value, except for one's clothing and household goods of personal value. Contrary to plaintiffs' assertion, all the cases cited in footnote 9 in the cross-petition involved property with a proven market value. (Cross-Petition at 19).

Furthermore, the $5.5 million awarded by the district court for "replacement" of marine organisms was calculated on the basis of clearly erroneous findings of fact. When viewed in a light most favorable to plaintiffs, the evidence in the record could only support a finding that a few hundred marine organisms, mostly fiddler crabs and marine worms, were killed by the oil spill. Moreover, there is no evidence in the record of any permanent loss; the few marine organisms killed by the oil spill in 1973 may already have been spontaneously replaced by natural regeneration. Finally, there is absolutely no evidence that a market for the marine organisms exists or that they ever have been considered to have monetary value.

Thus even if this Court were to grant the cross-petition and reverse the court of appeals' ruling on the "replacement cost" theory, the $5.5 million award nevertheless would properly be vacated on remand on the contested questions of fact.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that plaintiffs' cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 14, 1981

APPENDIX I

Dr. Sorensen's Calculation of Damages for "Replacement" of Marine Organisms

		Station 2	Station 3	Station 4	Station 1
Data from UPR Supplemental Survey (A952, A955, A957, A959)					(not used)
Total Number of Organisms Found at "Control" Stations and at Most Heavily Oiled Locations at Bahia Sucia	"Control" (no oil)	45	87	30	14
	Bahia Sucia	0	0	1	36
Difference:		45	87	29	(22)

Sum: $45 + 87 + 29 = 161$ organisms

Average Difference: $161 \div 3 = 53.67$ organisms/station

Conversion from six 10 cm diameter cores to $1m^2$ (Conversion factor = 21.22):

53.67 organisms/station $\times$ 21.22* $= 1138$ organisms/m^2

Conversion from $1m^2$ to 1 acre (Conversion factor = 4047):

1138 organisms/$m^2 \times 4047 =$ 4,605,486 organisms/acre

Conversion from 1 acre to 20 acres:

4,605,486 organisms/acre $\times$ 20 = 92,109,720 organisms/20 acres

Damages for replacement of marine organisms:

$92,109,720 \times .06 =$ $5,526,583.20

(A1442-A1443)

*1. The 21.22 conversion factor from the area of the core samples to one square meter was derived by Dr. Lugo in his Report (A1428), as follows:

6 cores 10cm in diameter have an area of

$6 \pi r^2 = 6 \times 3.1416 \times 5 \times 5 = 471.24$ cm^2

$1m^2 = 100cm \times 100cm = 10,000$ cm^2

$$\text{Conversion factor} = \frac{10,000 \text{ cm}^2}{(471.24 \text{ cm}^2)\text{m}^2} = \frac{21.22}{\text{m}^2}$$

2. The conversion factor from the cores to 1 acre is
$21.22 \times 4047 = 85,877.34$

3. The conversion factor from the cores to 20 acres is
$21.22 \times 4047 \times 20 = 1,717,546.80$

No. 80-979

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE COMMONWEALTH OF PUERTO RICO AND THE ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO,
PETITIONERS,

v.

THE S.S. ZOE COLOCOTRONI, MARBONANZA COMPANIA NAVIERA, S.A., COLOCOTRONI LTD., COLOCOTRONI BROTHERS, S.A., THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG) AND THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LONDON) LIMITED,
RESPONDENTS.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

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In the
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REPLY BRIEF

Argument

I. DEFENDANTS' BRIEF IN OPPOSITION FAILS TO ADDRESS THE QUESTION PRESENTED FOR REVIEW.

Succinctly stated, the question presented to the court by the plaintiffs is whether under the pertinent statutes and applicable law they have a right to recover the total value of the damages caused to its natural resources by the ZOE COLOCOTRONI

oil spill. Defendants, rather than addressing this issue in the Brief in Opposition, have dedicated six of their eight pages to distort the evidence that was presented to the trial court. Defendants do not deny, nor could they, that the question presented for review involves an important question of Federal law which has not been, but should be, settled by this Court.

In essence, defendants' arguments in opposition to plaintiffs' cross-petition appear to be that the merit of the question presented for review notwithstanding the petition for a writ of certiorari should not be granted because they would allegedly prevail on a remand on the contested questions of fact. This is, to say the least, pure speculation.[1]

On page 8 of their brief in opposition, after having presented a distorted picture of the evidence to the court and having argued their case in the manner less favorable to plaintiffs' case, defendants finally submit that, "the evidence in the record could only support a finding that a few hundred marine organisms, mostly fiddler crabs and marine worms, were killed by the oil spill".[2]

---

[1] Defendants presented the same distorted picture of the evidence properly in the record when they filed their Rule 60(b) motion before the District Court. The order of the court dated August 8, 1979, denying their motion, clearly shows that defendants' attack on plaintiffs' trial evidence is totally unsupported and without merit. Said order is reproduced as Appendix A to plaintiffs' Cross-Petition, pp. 22 through 27. Thus, contrary to defendants' fictional narration of the evidence, it is patently clear that the record amply supports the District Court's findings as to the number of marine animals destroyed and the replacement cost of the same.

[2] Defendants, in their petition for a writ of certiorari in Case No. 80-758, pp. 2, 3, had also candidly admitted that "it is undisputed that mangrove trees and marine organisms were killed by the oil spill".

Assuming arguendo that only a few hundred animals were destroyed and not the 92,109,720 animals which the District Court found, after six weeks of trial, the oil had destroyed, and, assuming arguendo that only marine worms and fiddler crabs were destroyed by oil, not fish larva, shrimps, crabs, lobsters, conch, snails, oysters and others as the District Court found were destroyed, one question still remains unanswered. Whether Puerto Rico and the coastal states are entitled to the replacement costs of these animals. This is the question that the plaintiffs are seeking to have reviewed by the court.

Conclusion

For the foregoing reasons, and for the reasons set forth in plaintiffs' cross-petition for a writ of certiorari, plaintiffs respectfully submit that their petition should be granted.

Respectfully submitted,

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